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No. 87-1152

In the Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF
THE STATE OF HAWAII, ET AL., PETITIONERS

v.

HAWAIIAN TELEPHONE COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in a suit brought pursuant to Section 401(b) of the Communications Act of 1934, 47 U.S.C. 401(b), the district court correctly concluded that the Hawaii Public Utilities Commission had not followed an order of the Federal Communications Commission separating the costs of the Hawaiian Telephone Company between interstate and intrastate uses and properly ordered an adjustment of the company's intrastate rates to correct that failure.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Communications Act of 1934 establishes a system of dual federal and state regulation over telephone service. The Act authorizes the Federal Communications Commission (FCC) to regulate interstate and foreign service, but it reserves to the states the authority to set rates for intrastate service. 47 U.S.C. (& Supp. III) 151, 152(b); see *Louisiana Pub. Serv. Comm'n* v. *FCC,* 476 U.S. 355, 360 (1986). This seemingly "clean parceling of responsibility" is complicated by that fact that "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service" (*ibid.*). For that reason, and because rates are designed to provide a telephone company's "revenue requirement," which is the sum of a carrier's reasonable expenses plus a return on its investment in the

property used in providing telephone service, it is necessary to separate and allocate to the appropriate jurisdiction (intrastate or interstate) the costs of telephone equipment before rates for each jurisdiction are set. *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). The Communications Act authorizes the FCC to separate and allocate the costs of telephone equipment to the appropriate jurisdiction. 47 U.S.C. 221(c), 410(c).[1] Since 1970, separations for carriers in the 48 contiguous states have been governed by the FCC's "Ozark Plan." See *Separation Procedures*, 26 F.C.C. 2d 247 (1970).

Until recently, most carriers who jointly provided interstate service negotiated settlements to divide the interstate revenues in an equitable manner.[2] Settlements generally were based on the costs of the participating carriers as determined pursuant to the Commission's jurisdictional separations procedures. Thus, in settling with an independent local exchange carrier for interstate service, the American Telephone and Telegraph Company (AT&T) typically would pay that carrier's interstate expenses (as determined by separations procedures) plus a return on that carrier's interstate investment (similarly determined).

[1] To illustrate how ratemaking works, suppose a telephone company bought a telephone booth for $20,000 and the FCC allocated 80% of its cost to the intrastate jurisdiction. If the state commission agreed that the telephone booth was a reasonable expense and that $20,000 was a reasonable price (see Pet. App. 27a n.30), there would be a $16,000 increase in the carrier's investment in property providing intrastate service in the first year the booth was used. If the carrier's rate of return is 10%, it would be entitled to increase its intrastate rates by $1,600 to provide a return on its investment in the telephone booth. It would also be entitled to a depreciation expense. If the state commission decided that the telephone booth should last 20 years and used straight-line methods, the annual depreciation expense would be $1,000 and $800 would be added to the carrier's annual intrastate revenue requirement as an expense.

[2] Although settlements still take place in some communications contexts, the FCC recently replaced them with a system of "access charges" for purposes of most telephone services. Under the access charge procedure, long-distance carriers (and some other users) pay local exchange carriers an access charge for the use of the local exchanges, rather than sharing revenues through a settlements process. See *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

b. Interstate rates in the 48 contiguous states have traditionally been set so that rates are uniform for given distances and durations of long distance calls. Until the advent of satellite communications, the cost of calls to and from Hawaii and Alaska was about three times higher than the cost for calls of similar distance and duration on the mainland (Pet. App. 5a, 97a). With the advent of satellite communications, which generally do not increase in cost as the distance of the call increases, the FCC in the early 1970s saw an opportunity to integrate Hawaii and Alaska into the nationwide rate structure.[3] Until that time, the Commission had not established separations procedures that were applicable to Hawaii and Alaska. Instead, petitioner, the Hawaii Public Utility Commission (PUC), had used its own "Hawaiian Plan II" to determine the intrastate costs of respondent, the Hawaiian Telephone Company. AT&T had made interstate settlement payments to the Hawaiian Telephone Company based on the Hawaii PUC's separations decisions.

In 1981, in conjunction with transitional procedures for integrating Hawaii into the nationwide rate structure, the FCC approved the recommendation of a joint board (on which the Chairman of the Hawaii PUC served (Pet. App. 130a n.*)) that the separations procedure set forth in the Ozark Plan be applied in Hawaii without modification (*id.* at 249a-250a). Because interstate rates for calls to and from Hawaii had been three times higher than rates for comparable calls on the mainland, integration was expected "to yield significantly lower interstate phone rates" (*id.* at 6a). However, because application of the Ozark Plan separations procedures would allocate more costs to the in-

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[3] See *Domestic Communications-Satellite Facilities*, 35 F.C.C. 2d 844, 856-859, reconsideration denied, 38 F.C.C. 2d 665, 692-697 (1972). The FCC in that proceeding adopted a policy of conditioning any grants of domestic satellite authorizations on the carriers' undertaking to reduce rates to and from remote areas promptly so as "to integrate these * * * points into the uniform mileage rate pattern that now obtains for the contiguous states." 35 F.C.C. 2d at 857. See also *Integration of Rates and Services*, 61 F.C.C. 2d 380 (1976), reconsideration denied in part, 65 F.C.C. 2d 324 (1977).

trastate side, there was also expected to be "upward pressure on intrastate rates" (*ibid.*).[4] "To avoid a dramatic impact on local rates" (*ibid.*), the Hawaiian Telephone Company and AT&T proposed that the third and final step of rate integration be deferred to January 1, 1985, and the FCC approved the proposal (*id.* at 6a-7a, 264a). Between 1981 and 1984, while integration remained incomplete and separations were made according to the Ozark Plan, AT&T agreed to make "transitional supplement" payments to the Hawaiian Telephone Company in addition to regular settlement payments (*id.* at 7a).[5]

2. a. About one month after the FCC approved the agreement between the Hawaiian Telephone Company and AT&T, the Hawaiian Telephone Company filed an application with the Hawaii PUC to increase its intrastate rates by about $48 million annually (Pet. App. 123a). This application, which is the first of two applications relevant here, was decided using 1982 as the test year (*id.* at 124a). During 1982, AT&T's transitional supplement payment to the Hawaiian Telephone Company was about $38 million (*id.* at 131a). The Hawaii Consumer Advocate (a petitioner along with the Hawaii PUC) contended that the transitional supplement should be treated as intrastate revenue (*ibid.*), which would reduce considerably the amount of any intrastate rate increase. The Consumer Advocate particularly noted that the Hawaiian Telephone Company had stated, in

[4] For example, using the figures in note 1, *supra*, if 80% of the cost of a $20,000 telephone booth that is expected to last 20 years is allocated to the intrastate jurisdiction and the intrastate rate of return is 10%, the telephone company is entitled to intrastate rates providing a $1,600 return on this part of its investment (10% × 80% × $20,000) and a depreciation expense of $800 (80% × $1,000) for the first year of its use, for a total of $2,400. If 90% of the cost of the booth is allocated to the intrastate jurisdiction and the rate of return is held at 10%, the company would be entitled to a return of $1,800 (10% × 90% × $20,000) and an expense of $900 (90% × $1,000), for a total of $2,700. Thus, allocating 10% more of the cost of the booth to intrastate service would lead to a $300 increase (12½%) in intrastate rates.

[5] The transitional supplement payments were "based on a declining percentage of the cumulative total growth over 1979 in actual * * * interstate revenues" (Pet. App. 253a).

order to gain the support of the Governor for its agreement with AT&T, that the agreement's provision of transitional supplement payments would reduce the need for intrastate rate increases (*id.* at 132a). The Hawaiian Telephone Company, while contending that the transitional supplement payments were interstate rather than intrastate revenues (*id.* at 131a-132a), nevertheless stated that it had reduced its proposed intrastate rate increase from $101 million to $48 million because of the transitional supplement payments (*id.* at 155a (dissenting opinion)).

The Hawaii PUC first concluded, contrary to the Consumer Advocate, that the transitional supplement payments were plainly interstate revenues and that "[t]he use of interstate revenues to satisfy intrastate revenue requirements would violate the fundamental principles of jurisdictional separations" (Pet. App. 132a). However, it also concluded that "the record is clear that if the State of Hawaii, through its Governor, had not supported the negotiated settlement, the Agreement between AT&T and [the Hawaiian Telephone Company] would not have been approved by the FCC" (*id.* at 133a). Had the settlement not been approved, the PUC concluded, then separations would have been made according to Hawaiian Plan II rather than the Ozark Plan. The effect of using the Ozark Plan, it further found, was that, on paper, "the intrastate rate of return under present rates is reduced by 1.1%" (*ibid.*).[6] Finding that "it would be totally unjust and unreasonable if [the Hawaiian Telephone Company] after obtaining the benefit of the transitional revenues were *also* to receive * * * the difference between

[6] An increase in the percentage of telephone equipment allocated to the intrastate jurisdiction leads to a decrease in a carrier's rate of return in the absence of an increase in the carrier's revenues. For example, using the figures in notes 1 and 4, *supra,* if 80% of the cost of a $20,000 telephone booth is allocated to the intrastate jurisdiction, and the rate of return is 10%, the carrier is entitled to rates providing $1,600 in revenues. But if 90% of the cost of the booth is allocated to the intrastate jurisdiction, and revenues are held constant at $1,600, the rate of return would be 8.9% ($1,600 / $18,000). Thus, in the absence of an increase in the carrier's revenues, the rate of return would decline by 1.1% as a result of shifting more of the cost of the telephone booth to the intrastate jurisdiction.

Hawaiian Plan II and the Ozark Separation formulas" (*id.* at 138a (emphasis in original)), the PUC decided to reduce the Hawaiian Telephone Company's rate of return by 1.1%.[7]

The Hawaii Supreme Court affirmed (Pet. App. 66a-89a). Noting that "[t]he rate award was obviously shaped to take account of uncommon circumstances" (*id.* at 83a), the court saw "no reason to disturb the pragmatic adjustment" made by the Hawaii PUC (*id.* at 89a).

b. Before the Hawaii Supreme Court had ruled on its rate request for test year 1982, the Hawaiian Telephone Company filed a second rate increase request, using 1983 as the test year (Pet. App. 90a). The PUC reaffirmed its "decision that the transitional supplement revenues cannot be treated as intrastate revenues" (*id.* at 101a). It explained that in its previous decision it "made no shift in expenses from intrastate to interstate," but instead "made an *appropriate adjustment* to provide reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between [the Hawaiian Telephone Company] and AT&T" (*ibid.* (emphasis in original)). It decided again to reduce the Hawaiian Telephone Company's rate of return by 1.1%, "emphasiz[ing] the fact that by making such an adjustment, we are not substituting the Hawaiian Plan II for the Ozark Plan for ratemaking purposes" (*id.* at 105a). The PUC recognized that transitional supplement payments would cease in 1984 and that its decision would not be implemented until 1985 (*id.* at 102a), but nevertheless took the transitional supplement into account because "1983 is the test year" (*id.* at 103a). The result was a decrease in intrastate revenues of $10.5 million (*id.* at 55a).[8]

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[7] One member of the Hawaii PUC dissented on the basis that its "backdoor use of interstate revenues" (Pet. App. 157a) was "not within [the PUC's] authority" (*id.* at 160a).

[8] The same commissioner who had dissented previously dissented again, stating that "[d]espite the protestations to the contrary, the majority continues to undercut the Ozark Plan which it ostensibly adopts" (Pet. App. 120a). As relevant here, the PUC affirmed its prior decision on motion for reconsideration (*id.* at 49a-65a).

3. a. The Hawaiian Telephone Company then filed this action in the United States District Court for the District of Hawaii.[9] It brought suit pursuant to Section 401(b) of the Communications Act, 47 U.S.C. 401(b), which provides that "[i]f any persons fails or neglects to obey an order of the Commission," the district courts "shall enforce obedience to such order by a writ of injunction or other proper process." The Hawaiian Telephone Company argued that the Hawaiian PUC was failing to comply with the FCC's order that Ozark Plan separations procedures be used in Hawaii, but was instead making intrastate rate determinations based on Hawaiian Plan II separations.

As a preliminary matter, the district court determined that the Hawaiian Telephone Company's action was not barred by the Johnson Act, 28 U.S.C. 1342, which provides in pertinent part that "[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or rate-making body" where "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution." The district court noted that the Johnson Act "by its own terms applies only when jurisdiction is founded *solely* on diversity of citizenship or repugnance to the Federal constitution," whereas "[h]ere, [the Hawaiian Telephone Company's] claim arises under 47 U.S.C. § 401(b)" (Pet. App. 45a (emphasis in original)). The court also concluded that the denial of its first rate increase request did not bar the Hawaiian Telephone Company's challenge to rates for a subsequent year (*ibid.*).

On the merits, the district court concluded that "[n]otwithstanding the PUC's disclaimer of any such action, the PUC's action had the effect of applying Hawaiian Plan II * * * instead of the Ozark Plan as a basis for separations. The so-called 'appropriate adjustment' made by the PUC * * * was calculated solely and precisely on the difference between

[9] The Hawaiian Telephone Company initially appealed the second Hawaii PUC decision to the Hawaii Supreme Court, but dismissed that appeal after obtaining relief from the PUC on reconsideration on several issues not relevant here.

Hawaiian Plan II and the Ozark Separations formulas. * * * Because the PUC's 1.1% 'appropriate adjustment' * * * was directly the product of applying Hawaiian Plan II for purposes of separations, the PUC thereby failed and neglected to obey FCC Order 81-312, which required the application of the federal Separations Manual." Pet. App. 44a. The district court permanently enjoined the PUC from failing to follow the Ozark Plan and ordered it to make effective intrastate rates sufficient to generate additional revenues of $10.5 million annually (*id.* at 177a).

b. The court of appeals affirmed (Pet. App. 1a-36a). It first concluded that FCC Order 81-312, which provides that the Ozark Separations Manual "SHALL APPLY to Hawaii and Alaska" (Pet. App. 250a), is an "order" within the meaning of Section 401(b). It noted that the First Circuit had concluded in *New England Tel. & Tel. Co.* v. *Public Util. Comm'n of Maine*, 742 F.2d 1 (1984), cert. denied, 476 U.S. 1174 (1986), that, in general, rulemaking orders are not "order[s]" under Section 401(b), and that Order 81-312 resulted from a rulemaking proceeding (Pet. App. 14a). The court concluded that it "need not decide today whether every rule, order, or regulation promulgated by the FCC is an enforceable order under § 401(b)" because "[t]he language of the particular order in question, and the proceedings leading up to it, demonstrate that the FCC intended Order 81-312 to require particular actions be taken by the PUC and private carriers providing service to Hawaii" (*id.* at 17a). Indeed, it noted that the "PUC conceded that it must abide by those FCC-mandated separations procedures" (*id.* at 17a-18a). "Under the circumstances," the court concluded, "FCC Order 81-312 was appropriately interpreted as an 'order' for enforcement by injunction in the district court" (*id.* at 18a).

With respect to the claim that the Hawaiian Telephone Company was barred from arguing that the PUC had failed to follow the FCC's order applying the Ozark Plan to Hawaii because that argument had been rejected in the first proceeding, the court of appeals noted that when the Hawaii PUC's first decision was made the Hawaiian Telephone Company "was operating under its transition agreement with AT&T * * * [which] provided for

payments to [the Hawaiian Telephone Company] to soften the impact on its overall revenues of the mandated use of the Ozark Plan" (Pet. App. 21a-22a). "In contrast," the court noted, the second order involved a "new setting" because it affected "rates effective January 1, 1985, after the transition agreement had expired" (*id.* at 22a). Thus, while the PUC's first decision affected rates during the period in which the Hawaiian Telephone Company received transitional supplement payments from AT&T, the second decision (although based on test year 1983, during which the Company received transitional supplement payments) would only affect the rates charged after the payments had ceased. Relying on *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948), the court concluded that the Hawaiian Telephone Company was not barred from raising the issue in the second proceeding because the cessation of the transitional supplement payments constituted a significant difference between the proceedings (Pet. App. 21a).[10]

On the merits, petitioners "concede[d] the FCC's plenary authority over separations procedures" (Pet. App. 23a). They instead argued that the FCC "had not exercised" its power to control the Hawaii PUC's ratemaking proceedings with respect to separations matters (*id.* at 22a-23a). The court of appeals rejected that contention. It noted that Section 410(c) of the Communications Act grants the FCC authority to decide separations matters (*id.* at 24a). It then observed that "separations for interstate ratemaking and separations for intrastate ratemaking are two sides of the same coin" (*id.* at 23a), so that "FCC Order 81-312 necessarily preempted any independent separations procedures of the Hawaii PUC" (*id.* at 25a). The court noted that this Court's decision in *Louisiana Pub. Serv. Comm'n,* which concerned intrastate ratemaking *after* the FCC separates interstate and intrastate expenses (476 U.S. at 375), "supports our conclusion that the FCC separations procedures authorized by § 410(c) of the Act bind the states" (Pet. App. 27a).

The court of appeals next agreed with the district court that "the 'appropriate adjustment' here was a fairly transparent and improper attempt to circumvent the FCC mandate" (Pet. App.

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[10] The court of appeals rejected the Hawaii PUC's contention that the Johnson Act bars the injunction for essentially the same reasons given by the district court (Pet. App. 19a-20a).

27a). It concluded: "The PUC clearly has supreme authority with regard to intrastate ratemaking; but the PUC is not entitled to define boundaries of its intrastate sphere that are different from those established by the valid FCC order. Nor can the PUC accomplish by subterfuge what it could not, by its own admission, do directly." Pet. App. 29a.[11]

DISCUSSION

1. Petitioners first argue (Pet. 18-19) that review is warranted because the decision below conflicts with the First Circuit's decision in *New England Tel. & Tel. Co.*, where the court concluded that Section 401(b) generally authorizes suits to enforce orders resulting from FCC adjudicatory proceedings, but not orders resulting from rulemaking proceedings. As an initial matter, for reasons stated more fully in our brief in *Public Serv. Comm'n of Maryland* v. *Chesapeake & Potomac Tel. Co.*, No. 84-1362, we, like the court below, are not persuaded by the First Circuit's conclusion that Section 401(b), which does not on its face distinguish between different types of orders, may generally be used only to enforce FCC orders resulting from adjudicatory proceedings.[12]

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[11] Judge Ferguson dissented. He first stated that while "[i]t is undisputed that the Communications Act empowers the FCC to prescribe uniform separations procedures for apportioning the property and expenses of telephone companies between the interstate jurisdiction, governed by the FCC, and the intrastate jurisdiction, governed by state regulatory authorities" (Pet. App. 30a), "error arises if it is concluded that this grant of authority extends to intrastate rate-making" (*id.* at 33a). However, he concluded that it was not necessary to reach that issue because, in his view, the Hawaiian Telephone Company was collaterally estopped by the prior Hawaii Supreme Court decision from arguing that the Hawaii PUC's "appropriate adjustment" was simply a device to avoid the FCC's separations order (*id.* at 35a-36a).

[12] We are serving a copy of our brief in *Public Serv. Comm'n of Maryland* on the parties here. The Court heard oral argument in that case, which presented the question whether an FCC rulemaking order that preempted the states from using depreciation methods contrary to those prescribed by the FCC could be enforced under Section 401(b). The Court did not decide that question, but instead remanded in light of the decision in *Louisiana Pub. Serv. Comm'n*, which held that the FCC lacks authority to prescribe preemptive depreciation procedures and hence resolved the underlying dispute in *Public Serv. Comm'n of Maryland*, 476 U.S. 445 (1986).

We do not believe that review is warranted here to resolve the alleged conflict in the courts of appeals. While the court below indicated its disagreement with the First Circuit's approach (Pet. App. 15a-17a), it is not at all clear that the two courts would reach different results on the facts of this case. In *New England Tel. & Tel. Co.*, the First Circuit held that an order issued as part of a rulemaking proceeding could not be enforced in an action brought under Section 401(b) against the Public Utilities Commission of Maine, which was not a party to the rulemaking proceeding. The court read "order" in Section 401(b) "to apply exclusively to those cases in which the [Federal Communications] Commission has previously considered and determined the specific rights and duties in question and where the private action seeks only to enforce the Commission's specific mandate" (742 F.2d at 5). Noting that "[r]ules are general in form and they can be highly general in content" (*id.* at 6), the court thought it unfair to enforce rules "against persons not parties to the rulemaking proceeding" (*id.* at 7). It suggested (without deciding) that suit might be brought pursuant to Section 401(b) to enforce the rulemaking order in that case against the Ohio Public Utilities Commission because the Ohio Commission had participated in that proceeding in response to a complaint directed against it and had been ordered explicitly to conform to the FCC's depreciation orders (*id.* at 9).

The concerns expressed by the First Circuit are not present here. The relevant FCC proceeding involved only questions relating to the integration of Hawaii and Alaska into the nationwide telephone rate structure and FCC Order 81-312 concisely provided that the Ozark Separations manual "SHALL APPLY to Hawaii and Alaska" (Pet. App. 250a). The Chairman of the Hawaii PUC served on the joint board that recommended that result and the Hawaii PUC participated in the FCC's consideration of the joint board's recommendation. Moreover, the PUC has consistently maintained that it agrees that the FCC's order requires it to apply Ozark Plan separations in state ratemaking proceedings (see pages 13-14, *infra*). In these circumstances, it does not seem unfair to require the Hawaii PUC to comply with the order the Hawaiian Telephone Company seeks to enforce.

Accordingly, it is not clear that the First Circuit would conclude that the order in question cannot be enforced against the Hawaii PUC pursuant to Section 401(b). It might conclude, with respect to FCC Order 81-312, that the Hawaii PUC is more comparable to the Ohio Public Utilities Commission than to the Public Utilities Commission of Maine, so that the order is enforceable.

Conversely, the court below made clear that it was "not decid[ing] today whether every rule, order, or regulation promulgated by the FCC is an enforceable order under § 401(b)" (Pet. App. 17a). Accordingly, in a case involving a very general rule where the defendant was not involved in the rulemaking proceedings, that court might conclude that the rule could not be enforced in a Section 401(b) proceeding. While the First Circuit and the Ninth Circuit might reach differing conclusions on the facts of *New England Tel. & Tel. Co.*, and while a number of other courts of appeals have reached conclusions contrary to those of the First Circuit (see cases cited at Pet. App. 15a n.19) and no court of appeals has followed the First Circuit's approach, this case is not an appropriate one for resolving the disagreements that have arisen.[13]

2. Petitioners next argue (Pet. 19-23) that 47 U.S.C. (& Supp. III) 152(b), as construed in *Louisiana Pub. Serv. Comm'n,* grants state regulatory commissions broad authority over intrastate rates and that the courts below improperly intruded into that realm here. We think that whether the courts below correctly concluded that the Hawaii PUC improperly refused to apply the Ozark Plan and properly ordered the PUC to increase the Hawaiian Telephone Company's intrastate rates by $10.5 million are close questions. However, the answers to

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[13] Petitioners suggest (Pet. 19 n.8) that the courts below erred in concluding that the issuance of an injunction was not prohibited by the Johnson Act. However, as we explained in our brief (at 17 n.14) in *Public Util. Comm'n of Maryland*, we agree with the courts below (Pet. App. 19a-20a, 45a) that where jurisdiction is based on a federal statute such as Section 401(b), the Johnson Act, which applies where "[j]urisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution," is not a bar to the issuance of an injunction.

those questions depend on how the complicated factual issues presented by this unique case are resolved rather than on how any legal issue is resolved. Accordingly, review by this Court is not warranted.

a. There is very little dispute with respect to any legal issue. On the one hand, it is undisputed that the states set rates for intrastate telephone service. On the other hand, it is clear that the FCC separates and allocates telephone equipment to the interstate and intrastate spheres, and that its decisions with respect to separations matters control. Section 410(c), added to the Communications Act in 1971, makes that plain. It provides that the FCC "shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations * * * to a Federal-State Joint Board." It further provides that the FCC "shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, *but not vote,* when it has under consideration the recommended decision of the Joint Board" (§ 410(c) (emphasis added)). Thus, under the scheme Congress established, the states participate in separations proceedings, but the FCC makes the final decision. Congress described the joint board procedure established in Section 410(c) as achieving "joint participation without abandoning Federal superintendence in the field." S. Rep. 92-362, 92d Cong., 1st Sess. 6 (1971).

The Hawaii PUC has recognized throughout the proceedings underlying this case that the FCC's separations orders control cost allocations in the state ratemaking proceedings. In its order with respect to the Hawaiian Telephone Company's first rate increase request, the PUC stated that "the Ozark Plan was made applicable to Hawaii by order of the Federal Communications Commission" (Pet. App. 139a). In its second order, the PUC stated that "this Commission did not adopt the Hawaiian Plan II in [the Hawaiian Telephone Company's] last rate case and the Commission recognized the Ozark Separation Plan as being appropriate in allocating expenses and capital expenditures between [the Hawaiian Telephone Company's] intrastate and interstate operations" (*id.* at 106a-107a). It reiterated on reconsideration that it was "not substituting the Hawaiian Plan II for

the Ozark Plan for ratemaking purposes" (*id.* at 52a-53a (emphasis omitted)). Thus, the Hawaii PUC agrees that the FCC's 1981 separations order is binding in its ratemaking proceedings. In the court of appeals, it "concede[d] the FCC's plenary authority over separations procedures" (*id.* at 23a).

Nothing in *Louisiana Pub. Serv. Comm'n* calls into question the Hawaii PUC's concession that the FCC's separations decision controls jurisdictional cost allocation in intrastate ratemaking proceedings. In that case, the "principal argument" that the FCC had authority to require state commissions to follow its depreciation rules was based on 47 U.S.C. 220, which deals specifically with depreciation (476 U.S. at 366). The Court concluded that Section 220 either merely "spell[s] out the authority of the FCC in the context of interstate regulation" (476 U.S. at 377) or "dictate[s] how the carriers' books would be kept for the purposes of financial reporting" (*id.* at 378), but does not give the FCC authority over depreciation practices used in intrastate ratemaking. The Court also concluded that 47 U.S.C. (& Supp. III) 152(b), which provides that the states have authority over "charges, classifications, practices, services, facilities, [and] regulations [used] for or in connection with intrastate communication service," expressly grants the states authority over depreciation practices, since " '[c]harges, 'classifications,' and 'practices,' are terms often used by accountants, regulators, courts, and commentators to denote depreciation treatment" (476 U.S 371). Here, in contrast, it is clear under Section 410(c) that the FCC has authority to determine separations for intrastate ratemaking purposes and Section 152(b) does not give the states authority to separate and allocate the costs of telephone equipment to the intrastate and interstate jurisdictions.[14]

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[14] Petitioners thus err (Pet. 22-23) in relying on the dissenting judge's view (Pet. App. 33a) that the Hawaiian Telephone Company's argument "is essentially the same kind of argument that the Court rejected in *Louisiana.*" Had the Court concluded in that case that Section 220 gives the FCC authority to prescribe depreciation methods for use in intrastate as well as interstate ratemaking proceedings and that Section 152(b) does not give the states authority to determine depreciation matters, it would have ruled differently. Here, in contrast to *Louisiana Pub. Serv. Comm'n*, it is undisputed that the authority granted the FCC over separations in Section 410(c), unlike its power

The Court noted in *Louisiana Pub. Serv. Comm'n* that federal and state regulators exercise their authority over rates in their respective jurisdictions "once the correct allocation between interstate and intrastate use has been made" (476 U.S. at 375). That is perfectly consistent with the conclusion that state regulators must respect the separations decisions made by the FCC in setting intrastate rates. In any event, in light of the position taken by the Hawaii PUC throughout the course of this litigation, this case presents no occasion to consider whether state regulators must follow the FCC's separations decisions.

b. The dispute here is primarily a factual dispute. The Hawaii PUC made what it termed an "appropriate adjustment" of the Hawaiian Telephone Company's rate of return on account of the company's receipt of transitional supplement payments from AT&T (Pet. App. 101a). However, while consistently maintaining that it was applying Ozark Plan separations procedures, the PUC calculated the adjustment by substituting the result that would obtain from application of the Hawaiian Plan II separations formula for the result under the Ozark Plan. In light of the PUC's choice of that method to implement the adjustment, the district court concluded that the PUC had not made an appropriate adjustment, but was simply refusing to apply Ozark Plan separations (*id.* at 44a). The court of appeals agreed, adding that the PUC cannot "accomplish by subterfuge what it could not, by its own admission, do directly" (*id.* at 29a).

It is not indisputably clear whether, in fact, the Hawaii PUC made an "appropriate adjustment" (Pet. App. 101a) or "a thinly veiled attempt to depart from the required separation of plant and expenses between interstate and intrastate use" (*id.* at 29a). On the one hand, an adjustment of the intrastate rate of return

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over depreciation under Section 220, extends to intrastate ratemaking. And, while it is clear that Section 152(b) grants the states authority over intrastate ratemaking (see 476 U.S. at 372-373), it has not been contended that it authorizes the states to establish their own separations procedures.

in light of the Hawaiian Telephone Company's receipt of transitional supplement payments would appear to be appropriate in light of its representations that the payments would limit its need to raise intrastate rates, even though the transitional supplement payments were interstate revenues.[15] On the other hand, the adjustment the PUC made, as the district court stressed, was not calculated with respect to the transitional supplement payments, but was instead "the product of applying Hawaiian Plan II for purposes of separations" (*id.* at 44a).

It is not appropriate for this Court to grant the petition to resolve this factual dispute. This is especially so since the proper resolution of this case depends on the treatment of the transitional supplement payments, which were paid from 1981 through 1984 and have ceased. Moreover, arrangements similar to AT&T's agreement to make transitional supplement payments are unlikely to be made in the future because interstate settlements have largely been replaced by access charges (see note 2, *supra*). Thus, the dispute here appears to be largely of historical interest.

c. Petitioners advance one argument with respect to the merits of the district court's order that may be of future relevance. They contend (Pet. 29-30) that the district court erred in ordering the Hawaii PUC to set rates sufficient to generate additional revenues of $10.5 million annually (Pet. App. 177a). In petitioners' view, once the court found that the PUC had failed to comply with the FCC's order, it should have enjoined the PUC without mandating a specific increase in the amount of the Hawaiian Telephone Company's intrastate revenues.

In our view, the specificity of the district court's order is troublesome. Section 152(b) clearly gives the states authority over the setting of intrastate rates. Thus, on the assumption that the district court was right in enjoining the Hawaii PUC from

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[15] Indeed, the Hawaiian Telephone Company stated in the first rate increase proceeding that it had reduced its request in light of the transitional supplement payments, thus apparently agreeing that an adjustment was appropriate (Pet. App. 155a (dissenting opinion)). Whether the Company in fact reduced its request as it claimed was never directly addressed by the Hawaii PUC.

failing to follow the Ozark Plan, the proper remedy would seem to be to instruct the PUC to calculate the Hawaiian Telephone Company's revenue requirement without regard to the difference between application of Ozark Separations and Hawaiian Plan II.[16] However, since the PUC found that the effect of using the Ozark Plan rather than Hawaiian Plan II would be to increase the Hawaiian Telephone Company's revenues by $10.5 million, and that its "appropriate adjustment" would reduce the company's revenues by that amount (Pet. App. 55a), it appears that there is no dispute that the result of the application of the Ozark Plan formula would be a $10.5 million increase in the Hawaiian Telephone Company's intrastate rates. Petitioners do not suggest that application of the Ozark Plan would lead to any other result. In that circumstance (in which the alleged error in the form of the order may be wholly immaterial), and since petitioners did not focus on the argument that the district court's remedy is improper in the courts below (which, accordingly, did not address the issue), there is no reason for this Court to consider whether the district court erred in specifying a $10.5 million increase in intrastate rates.

3. Petitioners also contend (Pet. 23-25) that, because of the Hawaii Supreme Court's decision affirming the Hawaii PUC's first rate order, the courts below were barred by res judicata or collateral estoppel from determining whether the PUC's similar adjustment in the second rate order was appropriate. It seems plainly correct that the change in circumstances cited by the

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[16] We see no reason, under the peculiar facts of this case, why the Hawaii PUC, after applying the Ozark Plan formula, could not then take into account the amount of the transitional supplement payment the Hawaiian Telephone Company would receive in setting its intrastate revenue requirement, which is what the Hawaii Consumer Advocate asked it to do and it declined to do (Pet. App. 132a). Indeed, as noted (see page 5 & note 15, *supra*), the Hawaiian Telephone Company has acknowledged that such an adjustment would be appropriate here, although it contends that it decreased its requested revenue requirement so that no further adjustment would be appropriate. Since the transitional supplement payments have ceased, however, whether the Hawaii PUC could adjust the Hawaiian Telephone Company's revenue requirement in light of those payments is not an issue of prospective importance.

court of appeals—the cessation of the transitional supplement payments—warranted a new consideration of the matter. In its second decision, the Hawaii PUC did not suggest that the cessation of transitional supplement payments was not a reason to reconsider the appropriateness of its adjustment. It instead stated that since the second rate request was based on test year 1983, and transitional supplement payments were made in that year, it would consider the effect of the payments even though it knew the payments would cease by the time its order took effect (Pet. App. 102a-103a). It seems clear that the Hawaii PUC would have reconsidered the appropriateness of the adjustment had the test year been 1985.[17] In any event, whether the change in circumstances here was sufficient so that the Hawaiian Telephone Company was not precluded from challenging the appropriateness of the adjustment of its rate of return is a fact-bound question not warranting review by this Court.[18]

[17] Indeed, petitioners appear to acknowledge that the PUC's only basis for the adjustment was the receipt of the transitional supplement payments, but they suggest that the Hawaiian Telephone Company's proper recourse is to apply for another rate increase based on test year 1985 (Pet. 28-29).

[18] Petitioners also contend (Pet. 24) that the Hawaiian Telephone Company's appeal of the second rate decision to the Hawaii Supreme Court, which the Company dismissed following the PUC's decision on reconsideration, barred its subsequent Section 401(b) action. The court of appeals did not consider whether the filing of an appeal from a state ratemaking order precludes a Section 401(b) action, an argument that petitioners did not press below. Moreover, the basis for petitioner's argument is its unsupported contention that under the Hawaii Rules of Civil Procedure a voluntary dismissal of an appeal is a dismissal with prejudice. In those circumstances, review by this Court is not warranted.

Similarly, petitioners raise various arguments relating to abstention (Pet. 25-28) that were not raised below until after the court of appeals had issued its decision (and hence were not addressed by the court of appeals). These belated contentions appear to depend on petitioners' assertion that the Hawaiian Telephone Company's Section 401(b) suit is barred by res judicata. Furthermore, there is little basis for contending that abstention is appropriate where a federal statute (§ 401(b)) specifically provides jurisdiction to determine whether a state agency is following federal law and there are no ongoing state proceedings. Accordingly, review of the abstention issues is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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